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MAR 11 1932
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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 714

WALTER J. MacDONALD, Trustee in Bankruptcy of Craig, Reed & Emerson, Inc.,
Petitioner Herein,

v.

PLYMOUTH COUNTY TRUST COMPANY,
Respondent Herein.

In the Matter of CRAIG, REED & EMERSON, INC., Bankrupt.

BRIEF OF RESPONDENT, PLYMOUTH COUNTY TRUST COMPANY.

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LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

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PLYMOUTH COUNTY TRUST COMPANY;
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In the Matter of CRAIG, REED & EMERSON, INC., Bankrupt.

BRIEF FOR THE RESPONDENT, PLYMOUTH COUNTY TRUST COMPANY.

Statement of Facts.

Craig, Reed & Emerson, Inc., was a Massachusetts corporation engaged in manufacturing shoes at Brockton, Massachusetts.

The Plymouth County Trust Company is a banking institution doing business in Brockton.

Craig, Reed & Emerson, Inc., owed $36,500 for some time to the Plymouth County Trust Company. (Rec., p. 83.) On March 8, 1927, the loan was changed from a time loan to a demand loan. (Rec., p. 83.)

Craig, Reed & Emerson, Inc., had its checking account at the Plymouth County Trust Company, and made its deposits there.

In June, 1929, Mr. Cooper, the president of the Plymouth County Trust Company, was asked to come over to the Plymouth Development Company, the office of a Mr. Davis, a preferred stockholder of Craig, Reed & Emerson, Inc. When Mr. Cooper arrived at the office of the Development Company, Messrs. Reed, Field and Craig, officers of Craig, Reed & Emerson, Inc., were there, as were the directors of the Plymouth Development Company.

Mr. Davis said that "the object of the meeting was to determine the best way to continue the business of Craig, Reed & Emerson, Inc., for the next few months at the smallest possible loss." (Rec., p. 58.)

Mr. Cooper, although present, did not speak (Rec., pp. 58, 59), and did not agree to anything. (Rec., p. 85.)

Subsequent to this conference, the business of Craig, Reed & Emerson, Inc., was conducted as usual, and deposits were made in the usual course of business by Craig, Reed & Emerson, Inc., in the Plymouth County Trust Company. (Rec., pp. 50, 51, 82.)

On July 11, 1929, Craig, Reed & Emerson, Inc., deposited in the Campello Branch of the Plymouth County Trust Company $15,100.78 in the form of checks drawn on New York. (Rec., pp. 35, 45; Exhibit 5, p. 101.)

Either on the same day, or on the morning of the 12th of July, the checks arrived at the main office of the bank. (Rec., p. 45.)

On the 12th day of July, 1929, there was on deposit in the Plymouth County Trust Company to the account of Craig, Reed & Emerson, Inc., $5140.87 collected funds (Rec., p. 69), and the uncollected checks of $15,100.78 drawn on New York.

On July 12, 1929, after the $15,100.78 checks arrived at the main office of the bank, the bank offset $4027.29 and $15,100.78, and made proper entries on July 12, 1929, showing the offset of $4027.29, but did not make the offsetting entries of the $15,100.78 checks until July 13th, when the checks had cleared. (Exhibit 6, p. 103; Rec., pp. 45, 69, 81.)

On July 12, 1929, $375 was also charged against Craig, Reed & Emerson, Inc., for rent due July 1st. (Rec., pp. 43, 44, 47, 48, 73.)

On July 15, 1929, $1348.72 was set-off by the bank, which was the amount of the balance remaining in the bank from July 12th in collected funds, plus uncollected checks of $347.76 and $316.56 deposited on July 15th. (Rec., pp. 41, 42.)

On July 16, 1929, Craig, Reed & Emerson, Inc., made a general assignment for the benefit of its creditors to L. H. Hall, assistant treasurer of the Plymouth County Trust Company (Rec., p. 25), and on the 28th day of September, 1929, an involuntary petition in bankruptcy was filed against Craig, Reed & Emerson, Inc. The company was adjudicated bankrupt on the 14th day of October, 1929, and subsequently Walter J. MacDonald was appointed trustee. (Rec., p. 1.)

The trustee filed a petition with the referee in bankruptcy to have the Trust Company turn over to him $20,476.79, claiming the same to be preferences. (Rec., p. 2.)

The Trust Company consented to the jurisdiction of the Referee, with the understanding that it was to be tried as a plenary suit. (Rec., pp. 24, 115.)

The Referee decided (Rec., pp. 6, 7) that the Trust Company had the right to set-off the rent of $375 and the $4027.29 set-off against the note, but that $16,108.49 was a preference. (Rec., p. 7.)

On review, the District Judge decided that all these amounts were preferences, and entered a decree for the sum of $20,476.79, with interest from December 5, 1929. (Rec., pp. 21, 24.)

On appeal, the Circuit Court of Appeals for the First Circuit reversed the decree of the District Court, leaving the trustee to proceed by a plenary suit in a court of competent jurisdiction. (Rec., p. 118.)

The Circuit Court of Appeals for the First Circuit reversed the decree of the District Court on the ground *that the Referee in Bankruptcy had no jurisdiction to hear a preference suit.*

The case is here on petition for a writ of certiorari.

Argument.

I.

A REFEREE HAS NO JURISDICTION TO HEAR A PREFERENCE CASE.

Weidhorn v. Levy, 253 U. S. 268.

"We find nothing in the provisions of the Bankruptcy Act that makes it necessary or reasonable to extend the authority or jurisdiction of the referee beyond the ordinary administrative proceedings in bankruptcy."

Sec. 23 (b) expressly excepts suits for preferences from the conference of jurisdiction upon the Court *by consent.*

Collette v. Adams, 249 U. S. 545.

"The exception ingrafted in sec. 23 (b) takes such suits out of the restricted provisions of that section; the sentence added to sec. 60 (b) makes them cognizable in the *Courts of Bankruptcy.*"

Sec. 60 (b) confers jurisdiction for the recovery of a preference "on any court of bankruptcy."

Sec. 1A (8). "Courts of bankruptcy" means the District Court, and does not include the Referee.

In re Walsh Bros., 21 A. B. R. 14; 163 Fed. 352.
In re Ballou, 33 A. B. R. 21, at 25; 215 Fed. 810.

> "But though such a suit can be brought in this court with the consent of the corporate petitioner, it cannot be brought before the referee with such consent. The jurisdiction conferred by that section on the District Court cannot be exercised by the referee."

In re Overholzer, 23 A. B. R. 10.

And all of said cases are approved by this Court in the *Weidhorn* case.

The District Court fails to distinguish between "*courts of Bankruptcy*" and "*court*" as defined in the Bankruptcy Act.

"Court" (sections 1 (a)-7) includes Referees, but "courts of bankruptcy" (sections 1 (a)-7) does not include Referees.

Congress has been very careful in the use of these words in the Bankruptcy Act, and where the Referee is not to be included, the words "court of bankruptcy" are always used. (See sections 2, 12 (b), 21 (a) and 34 (a).)

The Circuit Court of Appeals for the First Circuit correctly interpreted the Statute.

(a)

No agreement of parties can confer jurisdiction.

Shwartz v. Kaplan, 50 Fed. (2d) 947.
Nixon v. Michales, 38 Fed. (2d) 420.

This was a controversy between strangers to the bankruptcy, heard and decided by the Court of Appeals, and, on rehearing, the case was dismissed on the ground that there was no jurisdiction, and there could be no jurisdiction by consent.

Chi. B. & Q. Ry. Co. v. Willard, 220 U. S. 413.

II.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT.

The only question decided by the Court of Appeals was whether or not the Referee had jurisdiction, and the Court, following *Weidhorn v. Levy,* 253 U. S. 268, correctly decided that the Referee was without jurisdiction to hear a preference case.

The only other question raised, was a question of fact, as to whether or not the Plymouth County Trust Company, in setting off certain funds, received a recoverable preference.

The law on this question has been definitely settled by this Court, and the only matter that the lower Court had to decide was the proper application of the law to the facts.

Studley v. Boylston National Bank, 229 U. S. 523.
New York County Bank v. Massie, 192 U. S. 138.

In order to deprive the bank of its right of set-off, there must be collusion between the depositor and the bank, participated in by both.

Gardner Sav. Bank & Tr. Co. v. Loeb, 188 Fed. 285.
Rupp v. Commerce Guardian Trust & Sav. Bk., 32 Fed. (2d) 234.

(a)

The bank had a banker's lien on the checks when they were deposited.

Joyce v. Antem, 179 U. S. 591, at 597.

"It is familiar law that a bank receiving notes for collection is entitled, in the absence of a contract expressed or implied to the contrary, to retain them as security for a debt of the party depositing the notes."

(b)

There was no evidence to prove the insolvency of Craig, Reed & Emerson, Inc., on July 12, 13, 14 and 15, 1929, the dates of the alleged deposits.

"A person shall be deemed insolvent within the provisions of this Act, whenever the aggregate of his property . . . shall not, at a fair valuation, be sufficient in amount to pay his debts."
Bankruptcy Act, sec. 1, cl. 15.

"A fair valuation means the actual value . . . its real market value . . . It is what the property would sell for in the regular course of business, but not what the property would sell for at forced sale."
Loveland (4th ed.) p. 302.

"A man's property at a fair valuation may amount to sufficient to pay his debts, although he might not be able to realize at once the amount of that valuation."
Duncan v. Landis, 106 Fed. 839, 859.

"The valuation for a test of solvency or insolvency under the issue, must relate to the conditions as a going concern when the alleged preference was given, and not to the mere dead matter of the plant after bankruptcy intervened."
Butler Paper v. Goembel, 143 Fed. 295, 297.

The assignee, on August 21, 1929, issued a statement to all creditors, showing that Craig, Reed & Emerson, Inc., was perfectly solvent. (Exhibit 10, p. 104A.)

Conclusion.

It is respectfully submitted that the decision of the Circuit Court of Appeals is correct, and the Petition for Certiorari should be denied.

Respectfully submitted,

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